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MEMORANDUM OF LAW

DATE: November 4, 1999
TO: Bruce Herring, Deputy City Manager
FROM: Kelly J. Salt, Deputy City Attorney
SUBJECT: Smoking in Skyboxes at Qualcomm Stadium

Question Presented

Is smoking prohibited in the skyboxes at Qualcomm Stadium?

Short Answer

Yes. Smoking is prohibited in the skyboxes at Qualcomm Stadium.

Background

At the October 7, 1999, meeting of the Stadium Advisory Board, Board Member Joseph Martinez stated that he had attended a recent Chargers football game. In the skybox located next to the Directors' Skybox, a patron of the skybox was smoking a cigarette. The patron was asked to extinguish the cigarette, but he refused. Mr. Martinez inquired whether smoking is prohibited in the skyboxes at Qualcomm Stadium [Stadium].

Skyboxes are located on the Press and Loge Levels of the Stadium. Through the Stadium concessionaire, patrons of the skyboxes may have food and beverages delivered to their skyboxes. The food and beverages are set up in advance and may be replenished by the concessionaire's staff as requested during the football game, baseball game, or other event, for which the patron has purchased a ticket.

Analysis

I. San Diego Municipal Code

San Diego Municipal Code section 59.0103(m) provides that “[s]moking is prohibited in the Outside Seating Area and the press Level Area of the QUALCOMM Stadium.” Section 59.0103(m) defines “Outside Seating Area” to exclude the “enclosed areas adjacent to skybox ticketed seats.” According to the San Diego Municipal Code, smoking therefore would be permitted in skyboxes at the Stadium if a patron smokes in the enclosed area of a skybox adjacent to the skybox seats.¹ As discussed below, however, this provision of the San Diego Municipal Code has been preempted by recent amendments to the California Labor Code.

II. California Labor Code

In 1997, amendments were enacted to the California Labor Code [Labor Code] which established strict regulations for smoking in enclosed places of employment. Pursuant to Labor Code section 6404.5, the California legislature declared that regulation of smoking in the workplace is a matter of statewide concern, and that it is the intention of the legislature to prohibit the smoking of tobacco products in all enclosed places of employment in the state. The provisions of Section 6404.5 constitute a uniform statewide standard for regulating smoking of tobacco in enclosed places of employment and supersede and render unnecessary all local ordinances and regulations of smoking in enclosed places of employment. The legislature further declared, however, that any area not defined as a “place of employment” pursuant to Section 6404.5 may be subject to local regulation of smoking of tobacco. Cal. Labor Code § 6404.5(i).

From the foregoing, it is apparent that those provisions of the San Diego Municipal Code pertaining to smoking in the Stadium which are in conflict with the Labor Code provisions governing smoking in places of employment are preempted. An analysis of those areas identified in the Labor Code as not being places of employment and therefore not subject to the prohibition of smoking follows.

Labor Code section 6404.5(d) provides that “place of employment” does not include any of the following:

- (1) Sixty-five percent of the guest room accommodations in a hotel, motel, or similar transient lodging establishment.

¹SDMC section 43.1003 governs smoking in public places and places of employment. This section is not addressed in this memorandum because Section 59.0103(m) was intended to provide an authorization for smoking in the Stadium separate from the regulation of smoking in a public place and in a place of employment governed by Section 43.1003.

- (2) Areas of the lobby in a hotel, motel, or other similar transient lodging establishment, designated for smoking by the establishment
- (3) Meeting and banquet rooms in a hotel, motel, or other transient lodging establishment similar to a hotel or motel, restaurant, or public convention center, except while food or beverage functions are taking place, including setup, service, and cleanup activities
- (4) Retail or wholesale tobacco shops and private smokers' lounges
- (5) Cabs or motortrucks
- (6) Warehouse facilities
- (7) Gaming clubs
- (8) Bars and taverns For purposes of this paragraph, 'bar' or 'tavern' means a facility primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises, in which the serving of food is incidental
- (9) Theatrical production sites, if smoking is an integral part of the story in the theatrical production.
- (10) Medical research sites
- (11) Private residences
- (12) Patient smoking areas in long-term health care facilities
- (13) Breakrooms designated by employers

. . . .

As discussed above, if a place of employment is not specifically defined as being *excluded* from the definition of a place of employment pursuant to Section 6404.5(d), then smoking is prohibited in that location. Because the Stadium concessionaire has employees entering the enclosed area of the skyboxes in the course of their employment, and these areas are not specifically excluded from the definition of place of employment in Labor Code section 6404.5(d), the enclosed areas of the skyboxes must be considered to be a place of employment within the meaning of the Labor Code. Hence, smoking is prohibited in these areas.

Conclusion

San Diego Municipal Code section 59.0103(m) prohibits smoking in the seating area of Stadium skyboxes, but permits smoking in the enclosed areas of the skyboxes adjacent to the seating areas. This section of the San Diego Municipal Code, however, is preempted by Labor Code section 6404.5. Section 6404.5 prohibits smoking in places of employment. Employees of the Stadium concessionaire serve food in the enclosed areas of the skyboxes in the course of their employment. The enclosed areas of the skyboxes are not specifically excluded from the definition of "place of employment" pursuant to Labor Code section 6404.5(d). Consequently, these areas

must be considered to be a place of employment within the meaning of Section 6404.5. In accordance with Section 6404.5 and the San Diego Municipal Code, smoking therefore is prohibited in all areas of the skyboxes.

CASEY GWINN, City Attorney

By

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Deputy City Attorney

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